**STATEMENT**
**OF**
**SENATOR DANIEL K. INOUYE**
**CHAIRMAN**
**COMMITTEE ON INDIAN AFFAIRS**
**BEFORE THE**
**FEBRUARY 27, 2002**
**HEARING**
**ON**
**RULINGS**
**OF THE**
**UNITED STATES SUPREME COURT**
**AS THEY AFFECT**
**TRIBAL GOVERNMENT POWERS AND AUTHORITIES**

Well before this country was founded, Indian Nations exercised dominion and control over approximately 550 million acres of land.

Their governments pre-existed the formation of the United States government, and indeed were so sophisticated that the Framers of the United States Constitution modeled what was to become America's governmental structure after the government of the Iroquois Confederacy.

The recognition of the Indian Tribes as sovereign governments has its origins in the Constitution of the United States which in article three, section eight, clause three provides that "the Congress shall have the power to regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes."

From that time forward, this status of Indian Tribal governments as separate sovereigns has informed the laws enacted by the Congress and signed into law by the President over two centuries, and until relatively recently, served as the foundation for the rulings of the United States Supreme Court.

In the early 1830's, the United States Supreme Court's Chief Justice, John Marshall, articulated the fundamental principles upon which the body of Federal-Indian law would be constructed in a series of cases that are now referred to as the "Cherokee cases."

Yesterday, this committee received testimony from Professor Reid Chambers, who observed that at the time of Chief Justice Marshall's rulings, the Cherokee Nation had a written Constitution, an elected bicameral legislature, a tribal judicial system, schools, an established military, a written language, and a much higher adult literacy rate than any State of the Union at the time.

Today tribal governments have not only discarded the mantle of "ward" to the United States "guardian" of Chief Justice Marshall's day, but have assumed a wide range of governmental responsibilities that were formerly the exclusive province of the national government.

Although federal policies have vacillated and congressional acts have reflected those changes in policy, beginning in 1934 with the

enactment of the Indian Reorganization Act, and further reinforced in 1970 with the establishment of the federal policy of native self-determination and tribal self-governance, two of the three branches of the United States government have consistently acted in concert to reaffirm the legal status of Indian tribal governments as sovereign governments.

We are here today because there is a third branch of the United States government, the Judicial Branch, that appears to be headed in a decidedly different direction than the other two branches of the national government.

If there were a few aberrations from Supreme Court precedent and federal statutory law, one might not have cause for concern.

But those that study the law and the rulings of the United States Supreme Court instruct us that the Court is on a steady march to divest native governments of their governmental powers and authorities.

Principles long and well-established, such as the fact that tribal governments retain all of their inherent sovereign powers and authorities not relinquished by them in treaties, or abrogated by an express act of the Congress, appear to have been cast aside.

The fundamental principle that tribal governments have authority

to exercise jurisdiction over their territory, just as other governments do, is being steadily eroded by the Court's rulings.

And notwithstanding the provisions of the U.S. Constitution proscribing discrimination on the basis of race, the Court seems to be consistently imposing limitations on the exercise of tribal governmental jurisdiction based upon the race and ethnicity of those over whom such jurisdiction is exercised.

The historical foundations of the relationship between sovereign governments – the federal, state and tribal governments – appear to no longer have any legal import in the Court's rulings.

And last, but certainly not least, from the perspective of the branch of government that the United States Constitution charges with conducting relations with foreign governments, the several states and Indian tribes – the Congress – one is hard pressed to find references in the Court's opinions to the context in which the rest of America is operating – namely, federal laws and the policies they reflect.

So today, the Committee has called upon just a few of the many experts who have, through their writings and scholarly discourse, instructed us that there is cause for alarm, and that the Congress must act.

For that, the Committee is most grateful.

As a member of this committee for the past 22 years, I would be remiss however if I were to fail to address the past efforts of the Congress to respond to the problems identified in the landmark report entitled, "Misplaced Trust: the Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund."

This Report led to the enactment of the American Indian Trust Fund Management Reform Act of 1994, and I must observe that at the time, our objectives were very similar to those which we think the Secretary's proposal seeks to achieve.

In the Act, we sought to segregate those activities associated with the management of Indian trust funds from the other responsibilities of the Department and to establish an Office of Special Trustee in the office of the Secretary to assure that attention would be given to these matters at the highest levels of the Department.

So it is natural, I think, that members of this Committee will want to ask the Department's representatives – what is it about the Act's provisions that hasn't worked, and what is different about the Secretary's proposal that you think will make things work better?

The Committee will also receive testimony today on a few of the

tribal proposals that have been developed.

Perhaps the most important fact is that the Department and the tribal governments have agreed to work together, and we have called upon the Task Force chairs to provide the Committee with a status report on that work.

Finally, I would say that the Committee knows that there is considerable dissatisfaction with the consultation process and wide-spread opposition in Indian Country to the Secretary's proposal.

But this hearing is not intended to focus on those dynamics. They are behind us now.

What would be helpful to the Committee, should tribal governments wish to submit such to us in writing, are the reasons why the Secretary's proposal is unacceptable – not from a process point of view, but with regard to the substance of the proposal.

For that reason, the record of this hearing will remain open for 30 days, and we hope that tribal governments will respond to the Committee's call for written guidance.